

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STANDING ROCK SIOUX TRIBE,

Plaintiff,

and

CHEYENNE RIVER SIOUX TRIBE,

Plaintiff-Intervenor,

v.

U.S. ARMY CORPS OF ENGINEERS,

Defendant-Cross
Defendant,

and

DAKOTA ACCESS, LLC,

Defendant-Intervenor-
Cross Claimant.

Case No. 1:16-cv-1534-JEB
(and Consolidated Case Nos. 16-cv-1796
and 17-cv-267)

OGLALA SIOUX TRIBE'S MOTION FOR LEAVE TO FILE SUR-REPLY

Plaintiff Oglala Sioux Tribe (“Tribe”) hereby moves for leave to file the attached Sur-Reply to Reply Brief in Support of Army Corps’ Motion for Summary Judgment with Respect to Oglala Sioux Tribe’s Claims (“Sur-Reply”). Good cause exists for the grant of the motion for leave in that in its Reply Brief in Support of Army Corps’ Motion for Summary Judgment with Respect to Oglala Sioux Tribe’s Claims, ECF 472 (“Corps Reply”), Defendant Army Corps of Engineers (“Corps”) raised an argument not raised in its initial brief in support of its motion for summary judgment. The Sur-Reply is limited to addressing this one new issue. The Corps does not oppose this motion.

The standard for grant of leave to file a sur-reply brief is as follows:

“The decision to grant or deny leave to file a sur-reply is committed to the sound discretion of the Court,” *Ying Qing Lu v. Lezell*, 45 F.Supp.3d 86, 91 (D.D.C. 2014), and a sur-reply is appropriate “when a party is ‘unable to contest matters presented to the court for the first time’ in the last scheduled pleading.” *Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003) (quoting *Lewis v. Rumsfeld*, 154 F.Supp.2d 56, 61 (D.D.C. 2001)).

Connecticut v. U.S. Dep’t of the Interior, 344 F. Supp. 3d 279, 307 n.24 (D.D.C. 2018). In *Connecticut v. United States Department of Interior*, the Court granted leave to plaintiff to file a sur-reply where the Department of Interior raised the issue of *Chevron* deference for the first time in its reply brief. *Id.* Similarly, in *Alexander v. F.B.I.*, 186 F.R.D. 71 (D.D.C. 1998), the court granted plaintiffs leave to file a sur-reply to allow them to refute statements made in a declaration filed with the reply brief and not included in the original motion. *Id.* at 74 (“If the court were to deny plaintiffs leave to file the surreply, plaintiffs would be unable to contest matters presented to the court for the first time in the form of [the] declaration.”).

In the Corps Reply, the Corps makes a factual argument not set forth in its Opposition to Plaintiff Oglala Sioux Tribe’s Motion for Summary Judgment and Memorandum in Support of the Army Corps’ Cross-Motion for Summary Judgment, ECF 450 (“Corps Opening Brief”). Specifically, the Corps Reply states: “The Tribe had the original spill model methodology and worst case discharge formula … by no later than November 10, 2016, when these administrative record materials were transmitted to the Tribe.” *Id.* at 8. *See also id.* at 17 (same). The Corps notes that November 10, 2016, was approximately one month prior to the submission of the Tribe’s EarthFax report to the Corps. *Id.* at 8. This factual assertion was not made in the Corps Opening Brief. *See* ECF 450 at 16-17 (discussing Tribe’s EarthFax report without making the factual assertion that the Tribe had the original spill model methodology and worst case discharge formula when the EarthFax report was prepared). The Sur-Reply is limited to refuting

this factual assertion made for the first time in the Corps Reply. It is only two pages long, inclusive of caption and signature block.

Leave to file the attached Sur-Reply should be granted, because “If the court were to deny [the Tribe’s] leave to file the surreply, [the Tribe] would be unable to contest matters presented to the court for the first time in” the Corps’ Reply Brief. *Alexander*, 186 F.R.D. at 74.

Attached is a proposed order.

Counsel has contacted the Corps and other parties to this case to determine whether there is any opposition to the relief sought. The Corps does not oppose the requested relief. No other parties have responded to state their view.

For the foregoing reasons, we ask that this Court grant the Tribe’s Motion for Leave to File Sur-Reply.

Respectfully submitted,

s/ Michael L. Roy
Michael L. Roy (DC Bar No. 411841)
mroy@hobbsstraus.com
Jennifer P. Hughes (DC Bar No. 458321)
jhughes@hobbsstraus.com
Elliott A. Milhollin (DC Bar No. 474322)
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Attorneys for Oglala Sioux Tribe

Mario Gonzalez
Gonzalez Law Office
522 7th St 202
Rapid City, SD 57701
(605) 716-6355
Of Counsel for Oglala Sioux Tribe

November 22, 2019

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2019, I electronically filed the foregoing OGLALA SIOUX TRIBE'S MOTION FOR LEAVE TO FILE SUR-REPLY with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Michael L. Roy
Michael L. Roy

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and 17-cv-267)

**OGLALA SIOUX TRIBE'S SUR-REPLY TO REPLY BRIEF IN SUPPORT
OF ARMY CORPS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT
TO OGLALA SIOUX TRIBE'S CLAIMS**

In its reply brief in support of its motion for summary judgment with respect to claims of the Oglala Sioux Tribe (“Tribe”), ECF 472 (“Corps Reply”), Defendant Army Corps of Engineers (“Corps”) states: “The Tribe had the original spill model methodology and worst case discharge formula … by no later than November 10, 2016, when these administrative record materials were transmitted to the Tribe.” *Id.* at 8. *See also id.* at 17 (same). This is not true. The Tribe was not a party to this case at that time. The Tribe filed its own action on February 11, 2017, case no. 17-cv-00267, which was consolidated with this case by minute order on March 16, 2017. We requested the administrative record on February 27, 2017, Exhibit A to Declaration

of Michael Roy (“Roy Dec.”), and on March 1, 2017, the Corps’ counsel provided us the November 10, 2016 administrative record, excluding 31 documents pending confidentiality review and discussions and disposition of a motion by Dakota Access, LLC for a protective order. Ex. B to Roy Dec. The excluded documents were provided to us by counsel for Dakota Access on April 10, 2017, *see* Ex. C to Roy Dec., after the Court ruled on the protected information motion, ECF 205 (Order), ECF 206 (opinion), and the parties resolved issues involving protected information. The document cited in the Corps’ Reply as informing the Tribe of the spill model methodology and worst case discharge (“WCD”) formula, USACE_DAPL 72252-53, *see* Corps. Rep. at 8, 17, ECF 472, was provided to the Tribe on March 1, 2017. Roy Dec. ¶ 3. The spill model document containing the WCD calculation, USACE_DAPL 74725, 74729, which was subject to the Court’s ruling on the protective order, *see* ECF 206, was provided to us on April 10, 2017. Roy Dec.¶ 4.

Respectfully submitted,

s/ Michael L. Roy
Michael L. Roy (DC Bar No. 411841)
mroy@hobbsstraus.com
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**DECLARATION OF MICHAEL L. ROY IN SUPPORT OF OGLALA SIOUX
TRIBE'S SUR-REPLY TO REPLY BRIEF IN SUPPORT OF ARMY
CORPS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT
TO OGLALA SIOUX TRIBE'S CLAIMS**

I, Michael L. Roy, declare as follows:

1. I am counsel for Plaintiff Oglala Sioux Tribe (the "Tribe"). I am a member in good standing of the District of Columbia bar, and have been admitted to practice before this Court.
2. Attached as Exhibit A hereto are a true and correct copy of emails between me and Erica M. Zilioli, Counsel for the U.S. Army Corps of Engineers in this case, dated February

27-28, 2017. In the emails, I requested a copy of the administrative record filed in this case, and Ms. Zilioli agreed to provide the administrative record filed November 10, 2016.

3. Attached as Exhibit B hereto is a true and correct copy of a letter Ms. Zilioli addressed to me, dated March 1, 2017. I received the letter and the enclosures thereto by Federal Express on or about March 1, 2017. The enclosed disc included a copy of pages USACE_DAPL 72252-53 of the administrative record in this case.

4. Attached as Exhibit C hereto is a true and correct copy of an email sent to me on April 10, 2017, on behalf of David Debolt, counsel for Dakota Access, LLC in this case. The email included a link to documents from the administrative record provided to the parties on November 10, 2016, before the Tribe was a party to the case. I accessed the link and downloaded the documents, including the spill model document at USACE_DAPL 74713-29.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Michael L. Roy

Michael L. Roy (DC Bar No. 411841)

November 22, 2019

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2019, I electronically filed the foregoing DECLARATION OF MICHAEL L. ROY IN SUPPORT OF OGLALA SIOUX TRIBE'S SUR-REPLY TO REPLY BRIEF IN SUPPORT OF ARMY CORPS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO OGLALA SIOUX TRIBE'S CLAIMS and Exhibits A, B, and C thereto with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Michael L. Roy
Michael L. Roy (DC Bar No. 411841)

Michael L. Roy

From: Zilioli, Erica (ENRD) <Erica.Zilioli@usdoj.gov>
Sent: Tuesday, February 28, 2017 4:55 PM
To: Michael L. Roy
Cc: Schifman, Reuben (ENRD); Brar, Amarveer (ENRD); Jennifer P. Hughes
Subject: RE: Oglala Sioux v. Corps - consolidation

Thanks, Michael. We are planning to file the motion to consolidate this week for both the Yankton and Oglala Sioux cases. Obviously we would prefer to file an unopposed motion so as soon as you know your client's position please let us know.

We are having more discs made of the November 10 administrative record. If you were to agree to consolidation, we would agree to send you a copy this week.

Thanks,
Erica

Erica M. Zilioli
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, DC 20044
202.514.6390

From: Michael L. Roy [mailto:MRoy@hobbsstraus.com]
Sent: Monday, February 27, 2017 6:13 PM
To: Zilioli, Erica (ENRD) <EZilioli@ENRD.USDOJ.GOV>
Cc: Schifman, Reuben (ENRD) <RSchifman@ENRD.USDOJ.GOV>; Brar, Amarveer (ENRD) <ABrar@ENRD.USDOJ.GOV>; Jennifer P. Hughes <JHughes@hobbsstraus.com>
Subject: RE: Oglala Sioux v. Corps - consolidation

We are trying to determine our client's position. When are you planning to file?

On another issue, when can you provide us the administrative record that has been provided to date?

Michael L. Roy, Partner
T 202.822.8282 | F 202.296.8834

HOBBS STRAUS DEAN & WALKER, LLP
2120 L Street NW, Suite 700, Washington, DC 20037

HOBBSSTRAUSS.COM

From: Zilioli, Erica (ENRD) [mailto:Erica.Zilioli@usdoj.gov]
Sent: Monday, February 27, 2017 4:18 PM
To: Michael L. Roy <MRoy@hobbsstraus.com>
Cc: Schifman, Reuben (ENRD) <Reuben.Schifman@usdoj.gov>; Brar, Amarveer (ENRD) <Amarveer.Brar@usdoj.gov>
Subject: Oglala Sioux v. Corps - consolidation

Michael,

Following up on our conversation last week, we plan to move to consolidate the *Oglala Sioux Tribe v. Corps* case, 1:17-cv-0267 (D.D.C.) and the *Yankton Sioux Tribe v. Corps* case, 1:16-cv-1796 (D.D.C.) with the *Standing Rock* case. Please let us know as soon as possible what your client's position is regarding consolidation.

Thanks,
Erica

Erica M. Zilioli
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, DC 20044
202.514.6390

This email has been scanned for spam and viruses by Proofpoint Essentials. Click [here](#) to report this email as spam.

Hobbs, Straus, Dean and Walker, LLP. Confidentiality Statement

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U.S. Department of Justice

Environment and Natural Resources Division

Environmental Defense Section
P.O. Box 7611
Washington, DC 20044

Telephone: (202) 514-6390
Facsimile: (202) 514-8865

March 01, 2017

By Federal Express

Michael L. Roy
Hobbs Straus Dean & Walker, LLP
2120 L Street NW, Suite 700
Washington, DC 20037

Re: *Oglala Sioux Tribe v. U.S. Army Corps of Engineers*, 1:17-cv-0267 (D.D.C.)-
Corps' November 10 Administrative Record

Dear Michael:

Enclosed is a disc containing a copy of the U.S. Army Corps of Engineers' administrative record produced November 10, 2016, in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 1:17-cv-1534 (D.D.C.). You will see that 31 documents were omitted from the disc pending the conclusion of the parties' confidentiality review and discussions. Once Dakota Access, LLC's motion for a protective order concerning 11 of those documents is resolved, we will prepare a revised version of this administrative record.

Please do not hesitate to contact me at (202) 514-6390 or Erica.zilioli@usdoj.gov with any questions.

Best regards,

Erica M. Zilioli

Counsel for the U.S. Army Corps of Engineers

Michael L. Roy

From: mail@sf-notifications.com on behalf of David Debold <mail@sf-notifications.com>
Sent: Monday, April 10, 2017 4:36 PM
To: Michael L. Roy
Subject: Files to download

GIBSON DUNN

David Debold has sent you files.

Expires 4/17/17

To download these files, you must first activate your account and set your personal password.

A note from David :
The documents mentioned in my email earlier today are now accessible.

[Download](#)

Trouble with the above link? You can copy and paste the following URL into your web browser:
<https://gibsondunn.sharefile.com/d/8e549051d8d64c51?a=610e015e0a7c9073>

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**[PROPOSED] ORDER GRANTING OGLALA SIOUX TRIBE'S MOTION FOR LEAVE
TO FILE SUR-REPLY TO REPLY BRIEF IN SUPPORT OF ARMY CORPS' MOTION
FOR SUMMARY JUDGMENT WITH RESPECT TO THE OGLALA SIOUX TRIBE'S
CLAIMS**

THIS MATTER having come before this Court on the Oglala Sioux Tribe's Motion for Leave to File Sur-Reply to Reply Brief in Support of Army Corps' Motion for Summary Judgment with Respect to Oglala Sioux Tribe's Claims, and this Court having reviewed the motion and being otherwise fully advised:

IT IS ORDERED that this motion is granted, and

IT IS FURTHER ORDERED that the Clerk of Court shall file the submitted Sur-Reply to Reply in Support of Army Corps' Motion for Summary Judgment with Respect to Oglala Sioux Tribe's Claims.

Dated this _____ day of _____, 2019.

JAMES E. BOASBERG
United States District Judge